Office - Supreme Court, U.S.
FILED
NOV 17 1956
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1956

No. 587

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Petitioner,

against

RAYMOND G. CAHILL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM T. GRIFFIN,
233 Broadway,
New York, New York,

HERBERT BURSTEIN,
135 Broadway,
New York, New York,

Counsel for Petitioner.

INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statement	2
Reasons for Granting the Writ	3
Conclusion	9
Appendix A—Opinion of United States Court of Appeals for the Second Circuit	11
Appendix B—Judgment of the Court Below	13

Table of Cases Cited

Baltimore & Ohio Railroad Company v. Groeger, 266 U. S. 521	8
Brady v. Southern Railway Company, 320 U. S. 476	8
Cahill v. New York, New Haven & Hartford R.R. Co., 224 F. 2d 637 (CA 2)	2
Chicago v. Powers, 42 Ill. 169	7
District of Columbia v. Armes, 107 U. S. 519	7
Federal Communications Commission v. Pottsville Broadcasting Company, 309 U. S. 134	4
Lavender v. Kurn, 327 U. S. 645	7
Patton v. Texas & Pacific Railway Company, 179 U. S. 658	8
Plough v. Baltimore & O. R. Co., 164 F. 2d 254 (CA 2) cert. den. 333 U. S. 861	6
Re Sanford Fork & Tool Company, et al., 160 U. S. 247	4
Reynolds v. Atlantic Coastline Railroad Company, 336 U. S. 206	8

PAGE

Robins v. Pitcairn, 124 F. 2d 734 (CA 7) 6
Robitaille v. Netoco Community Theatre, etc., 305 Mass. 265 6
Sprague v. Ticonic National Bank, 307 U. S. 161 4
Tennant v. Peoria & Pekin Union Railway Company, 321 U. S. 79 8
Tiller v. Coast Line Railroad Company, 318 U. S. 54 8
Wilkerson v. McCarthy, 336 U. S. 53 8

Statutes Cited

28 U. S. C. Sec. 1254 1
28 U. S. C. Sec. 1651(a) 2
45 U. S. C. Sec. 51 et seq. 1, 2

Authorities Cited

James, Functions of Judge and Jury in Negligence Cases, 58 Yale L. J. 667 8
Supreme Court Certiorari Policy in Cases Arising Under the F.E.L.A., 69 Harv. L. Rev. 1441 7

Supreme Court of the United States

OCTOBER TERM, 1956

No. .....

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Petitioner,

against

RAYMOND G. CAHILL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, The New York, New Haven and Hartford Railroad Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, for the Second Circuit, entered in the above entitled cause on August 22nd, 1956.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit, printed in Appendix A hereto, *infra*, pages 11 to 12, is reported at 236 F. 2nd 410.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on August 22, 1956 (Appendix B, *infra*, p. 13). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 and 45 U. S. C. § 51 et seq.

Questions Presented

1. Whether the decision of the Court of Appeals for the Second Circuit is inconsistent with, and in violation of the mandate of this Court as stated in 351 U. S. 183.[1]

2. In an action under the Federal Employers' Liability Act, 45 U. S. C. § 51 et seq. where the alleged negligence is based upon a claim of a dangerous condition and Petitioner's notice thereof, may the trial court admit evidence of prior accidents without preliminary proof that these occurred under substantially similar circumstances, at a time not too remote, and permit the jury to draw an inference of such similarity of conditions and upon the basis of such an inference hold the Petitioner railroad liable?

Statement

Since this case has been considered by this Court on two occasions (350 U. S. 898; 351 U. S. 183), only a brief history of the litigation is submitted.

This suit was instituted under the Federal Employers' Liability Act, 45 U. S. C. § 51 et seq. to recover damages for personal injuries sustained by Respondent while employed by the Petitioner.

At the close of trial, the Respondent recovered a judgment against Petitioner in the amount of $90,000. The judgment was reversed by the Court of Appeals for the Second Circuit (*Cahill* v. *New York, New Haven & Hartford R.R. Co.*, 224 F. 2d 637 (CA 2)) without reaching a decision on Petitioner's claim that the Trial Court erred in admitting evidence of other accidents at or near the place of the accident in suit.

---

[1] Petitioner did not overlook the possible remedy of a writ of mandamus [28 U. S. C. § 1651(a)] but decided to petition for a writ of certiorari under 28 U. S. C. § 1254 because of uncertainty as to the availability of mandamus in this case.

Thereafter, this Honorable Court, by a *per curiam* decision, reversed the judgment of the Court of Appeals (350 U. S. 898).

Following denial by this Court of its petition for rehearing, Petitioner filed a motion to recall the judgment of this Court dated November 21, 1955. On May 14, 1956, the motion was granted (351 U. S. 183).

The Court of Appeals for the Second Circuit thereafter directed the parties to file briefs and on August 22, 1956, by a *per curiam* decision, affirmed the judgment of the District Court (236 F. 2d 410; Appendix A, *infra,* pp. 11 to 12).

The Court below, relying upon the dissenting opinion of Mr. Justice Black in this case (351 U. S. 183, 189-190), ruled that the "list of prior accidents was admissible" and further that "admission of the evidence, if assumed to be erroneous, was not so prejudicial as to justify reversal • • • " (Appendix A, *infra,* p. 12).

Petitioner respectfully submits that the Court of Appeals did not comply with the mandate of this Honorable Court.

Reasons for Granting the Writ

1. A decision by this Court will not only correct a plain error committed by the Court below but, more significantly, it will settle an important question of appellate practice, describe the appropriate role of United States Courts of Appeals in the review of cases remanded to them by the Supreme Court and ensure the orderly functioning of the federal judicial system.

Petitioner contends that the decision by the Court below is inconsistent with, and in violation of, the mandate of this Court and, as a consequence, Petitioner has been denied the appellate review vouchsafed by the decision of this Court.

In *Re Sanford Fork & Tool Company, et al.*, 160 U. S. 247, this Court pointed out that:

> "When a case has been once decided by this court on appeal and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded" (cf. *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U. S. 134; *Sprague* v. *Ticonic National Bank*, 307 U. S. 161).

The Court of Appeals incorrectly reported Petitioner's contention to be that "since these [prior] collisions were not shown to have been caused in a manner similar to the plaintiff's accident they were not relevant" (Appendix A, *infra*, p. 12). This was not Petitioner's claim and this was not the issue which the Court below was directed to consider.

The evidence issue originally urged before the Court of Appeals (224 F. 2d 637) and submitted again by Petitioner, following the order of this Court remanding the cause, was *whether the list of prior accidents was admissible without proof that they occurred under substantially similar circumstances, at a time not too remote, where, as in this case, the dangerous character of the location and Petitioner's knowledge of that character were in issue.*

A realistic appraisal of this Court's opinion (351 U. S. 183) shows that the sole issue to be resolved by the Court

below was whether evidence of prior accidents, offered by Respondent, was admissible if measured by the standard of substantial similarity of circumstances at a time not too remote from the time of the accident in question.

The Court below, like Mr. Justice Black, inferred the existence of the standard by mere proof that accidents had previously occurred. It is indisputable, however, that the trial Judge did not admit the challenged evidence because the prior accidents were shown to have occurred under substantially similar circumstances.[2] On the contrary, when the list of prior accidents was first offered, the trial Judge inquired whether there was evidence that the conditions which existed at the time of the prior accidents were substantially comparable or similar to those existing at the time of the accident in question (R. App. 58a).[3] Respondent's counsel then argued that the requirement of proof of substantial similarity was a principle of Connecticut law, not applicable in Federal Employers' Liability cases (R. App. 61a). The Respondent finally withdrew the offer (R. App. 63a) but never supplied the foundation requisite for the admission into evidence of the list of accidents. This is made clear by the statement of the trial Judge that he left it to the jury:

> "to draw an inference if it so decided of a similarity of conditions there over a period of years covered by these specific items" (R. App. 176a).

---

[2] Obviously, the list of accidents, standing alone, did not establish the circumstances and conditions at the time of the prior accidents and the circumstances of those accidents as, indeed, the trial judge said (R. App. 62a) and as Respondent's counsel acknowledged. They do not show who was injured, whether there were, in fact, any personal injuries, the physical condition at the locale of the accidents and the manner in which the accidents occurred. On the contrary, the testimony shows varying conditions at different times between 1946 and 1953 (R. App. 67a, 79a-80a, 91a, 103a-104a, 110a, 112a, 114a, 128a-129a, 155a).

[3] References are to pages in the transcript of the record filed in Case No. 436 in the October Term, 1955. 350 U. S. 898.

Now, it is significant that the trial Judge finally ruled that despite the absence of proof of substantially similar circumstances, the evidence would be admitted "for the limited purpose of showing * * * that the Railroad knew or under all the circumstances ought reasonably to have known that this was a dangerous area in which to station or to assign for duty * * * an inexperienced and untrained employee" (R. App. 175a).

This is precisely the decision enunciated by the Court below, exactly the argument advanced by Mr. Justice Black in his dissenting opinion (321 U. S. 183, 189-190) and plainly the contention rejected by the majority of this Court. Surely, this case was not remanded so that the Court of Appeals could enact the dissenting opinion of Mr. Justice Black.

The principle relied upon by Petitioner was not a novel one:

> "* * * the offer of proof did not include an offer to prove the conditions prevailing at the time of the two prior accidents. Under such circumstances the court did not err in sustaining the objection." [*Robins* v. *Pitcairn*, 124 F. 2d 734, 737 (CA 7).]

In *Plough* v. *Baltimore & O. R. Co.*, 164 F. 2d 254 (CA 2) cert. den. 333 U. S. 861, the Court below stated:

> "The plaintiffs were not permitted to prove that other accidents had occurred previously at this crossing. Such evidence is admissible when prior accidents have occurred under substantially similar conditions at a time not too remote, if the dangerous character of the crossing or the defendant's knowledge of that character are in issue. District of Columbia v. Armes, 107 U. S. 519, 2 S. Ct. 840, 27 L. Ed. 618; Sears, Roebuck & Co. v. Copeland, 4 Cir., 110 F. 2d 947" (p. 256).

In this case, the Court below disregarded not only the instructions of this Court but the lessons of its own decisions. The decision in *District of Columbia* v. *Armes*, 107 U. S. 519, relied upon by Mr. Justice Black in his dissenting opinion does not support the decision of the Court below. On the contrary, the Supreme Court in the cited case adopted the rule urged here and this is made evident by its approval of the principle stated in *Chicago* v. *Powers*, 42 Ill. 169.

The clue to the dilemma of the Court below is provided by its equivocal suggestion that even if the evidence was erroneously admitted, it "was not so prejudicial as to justify reversal * * *" (Appendix A, *infra*, p. 12). This improperly assumes that the Supreme Court neglected to search the record. Surely, if there were evidence in the record, other than evidence of prior accidents, which supported the charge of negligence, the Supreme Court would not have remanded this cause.

In *Lavender* v. *Kurn*, 327 U. S. 645, 654, this Court pointed out that it is "unnecessary to decide whether" challenged evidence is admissible if, apart from such evidence, there is "adequate support in the record for the jury's verdict * * *."

2. A decision by this Court will supply a reliable guide to the lower federal courts in cases involving the Federal Employers' Liability Act. Moreover, a decision will "clarify the standard for submission of cases to the jury in order to assure uniformity in the administration of the F.E.L.A." *"Supreme Court Certiorari Policy in Cases Arising Under the F.E.L.A."*, 69 Harv. L. Rev. 1441, 1450.

This case is not moot. As this Court previously said, the fact that the judgment has been paid should not deprive the Petitioner of any rights under the law.

The miscellany of cases decided by all federal courts, including this Court, has created a vast and not always reconcilable body of principles.

A substantial number of cases involve allegedly dangerous conditions at crossings and the question of actionable negligence frequently depends upon proof of prior accidents. Since the decisional trend favors admission of evidence, it is only fair and reasonable that rules of evidence, no matter how liberal, be delineated; otherwise, the Federal Employers' Liability Act becomes a law of absolute liability despite a contrary Congressional intention and acknowledgment by the courts that liability must rest upon proof that the defendant was negligent and that negligence was the proximate cause, in whole or in part, of the accident. *Tiller* v. *Coast Line Railroad Company,* 318 U. S. 54.

Petitioner's liability could be founded only upon a proven failure to use reasonable care in furnishing Respondent with a safe place to work. This duty is not an absolute one; hence Respondent had to prove that the care exercised by the Petitioner was not commensurate with the "danger attending the place * * *." *Patton* v. *Texas & Pacific Railway Company,* 179 U. S. 658, 664.

Probative facts, from which both negligence and causal relationship could reasonably be inferred, must be the basis for decision. Mere speculation cannot be " 'allowed to do duty for probative facts after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.' Galloway v. United States, 319 U. S. 372, 395 * * *." *Tennant* v. *Peoria & Pekin Union Railway Company,* 321 U. S. 29; *Brady* v. *Southern Railway Company,* 320 U. S. 476; *Baltimore & Ohio Railroad Company* v. *Groeger,* 266 U. S. 521; *Wilkerson* v. *McCarthy,* 336 U. S. 53; *Reynolds* v. *Atlantic Coast Line Railroad Company,* 336 U. S. 206.

In this case, the trial Judge abdicated his duty when he left it to the jury to find a similarity of conditions. *Robitaille* v. *Netoco Community Theatre, etc.,* 305 Mass. 265; *James, Functions of Judge and Jury in Negligence Cases,* 58 Yale L. J. 667.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

WILLIAM T. GRIFFIN,
HERBERT BURSTEIN,
Counsel for Petitioner.

Dated, November 16, 1956.

Appendix A

(Opinion of United States Court of Appeals For the Second Circuit)

No. 396—October Term, 1954.

(On Remand, Submitted August 9, 1956

Decided August 22, 1956.)

Docket No. 23559

—o—

RAYMOND G. CAHILL,

Plaintiff-Appellee,

v.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,

Defendant-Appellant.

—o—

Before:

HAND, SWAN and FRANK,

Circuit Judges.

Appeal from the United States District Court for the District of Connecticut, Robert P. Anderson, *Judge.*

WILLIAM T. GRIFFIN and HERBERT BURSTEIN, *Attorneys for defendant-appellant.*

RANDOLPH J. SEIFERT, *Attorney for plaintiff-appellee;* Harry Kalman and William A. Blank, of Counsel.

PER CURIAM:

When this case was first before us, judgment for the plaintiff was reversed, by a divided court, on a ground which rendered unnecessary decision of an alleged error

in the admission of evidence of prior accidents.* Our judgment was reversed by the Supreme Court, 350 U. S. 898, and by subsequent order the case was remanded to us for determination of the alleged evidentiary error. 351 U. S. 183. Additional briefs have been filed by the parties.

The prior accidents, nine in number, were listed in defendant's answer to plaintiff's 27th interrogatory. Each accident was described merely as a collision between a train and a motor vehicle at substantially the same place where plaintiff was injured, *i.e.*, near the intersection of Forbes Avenue and Waterfront Avenue. The collisions occurred during a period from January 4, 1946 to February 9, 1953. In none of them does it appear that any railroad employee or other person sustained injuries. The defendant argues that since these collisions were not shown to have been caused in a manner similar to the plaintiff's accident they were not relevant. The list of them was admitted for the sole purpose of supporting the plaintiff's claim that the Railroad knew or reasonably ought to have known that the particular location was an unsafe place to put him to work because of his inexperience and the claimed inadequacy of instructions given him as to his duties. For this limited purpose we think the list of prior accidents was admissible. *District of Columbia* v. *Armes*, 107 U. S. 519, 524, cited with approval in Mr. Justice Black's dissenting opinion in the instant case, 351 U. S. 183, 189-190; *Plough* v. *Baltimore & O. R. Co.*, 2 Cir., 164 F. 2d 254, 256, certiorari denied 333 U. S. 861; *Baltimore & O. R. Co.* v. *Felgenhauer*, 8 Cir., 168 F. 2d 12, 17. In any event, admission of the evidence, if assumed to be erroneous, was not so prejudicial as to justify reversal, for Palmer and Horan, employees long in defendant's service, had testified without objection that collisions between a train and vehicular traffic on Forbes Avenue had occurred from time to time, and Horan had expressly stated that flagmen had been killed out there.

Judgment affirmed.

---

* *Cahill* v. *New York, New Haven, & Hartford R. R. Co.*, 2 Cir., 224 F. 2d 637.

Appendix B

(Judgment of the Court Below)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of August, one thousand nine hundred and fifty-six.

Present: HON. LEARNED HAND,
HON. THOMAS W. SWAN,
HON. JEROME N. FRANK,
Circuit Judges.

—o—

RAYMOND G. CAHILL,
Plaintiff-Appellee,

v.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,
Defendant-Appellant.

—o—

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

by RALPH C. CURCIO
Deputy Clerk